

No. 12259

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

SEATTLE HARDWARE COMPANY,
Appellant

v.

CLARK SQUIRE, COLLECTOR OF
INTERNAL REVENUE,
Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION.

HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF FOR THE APPELLEE

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1017 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

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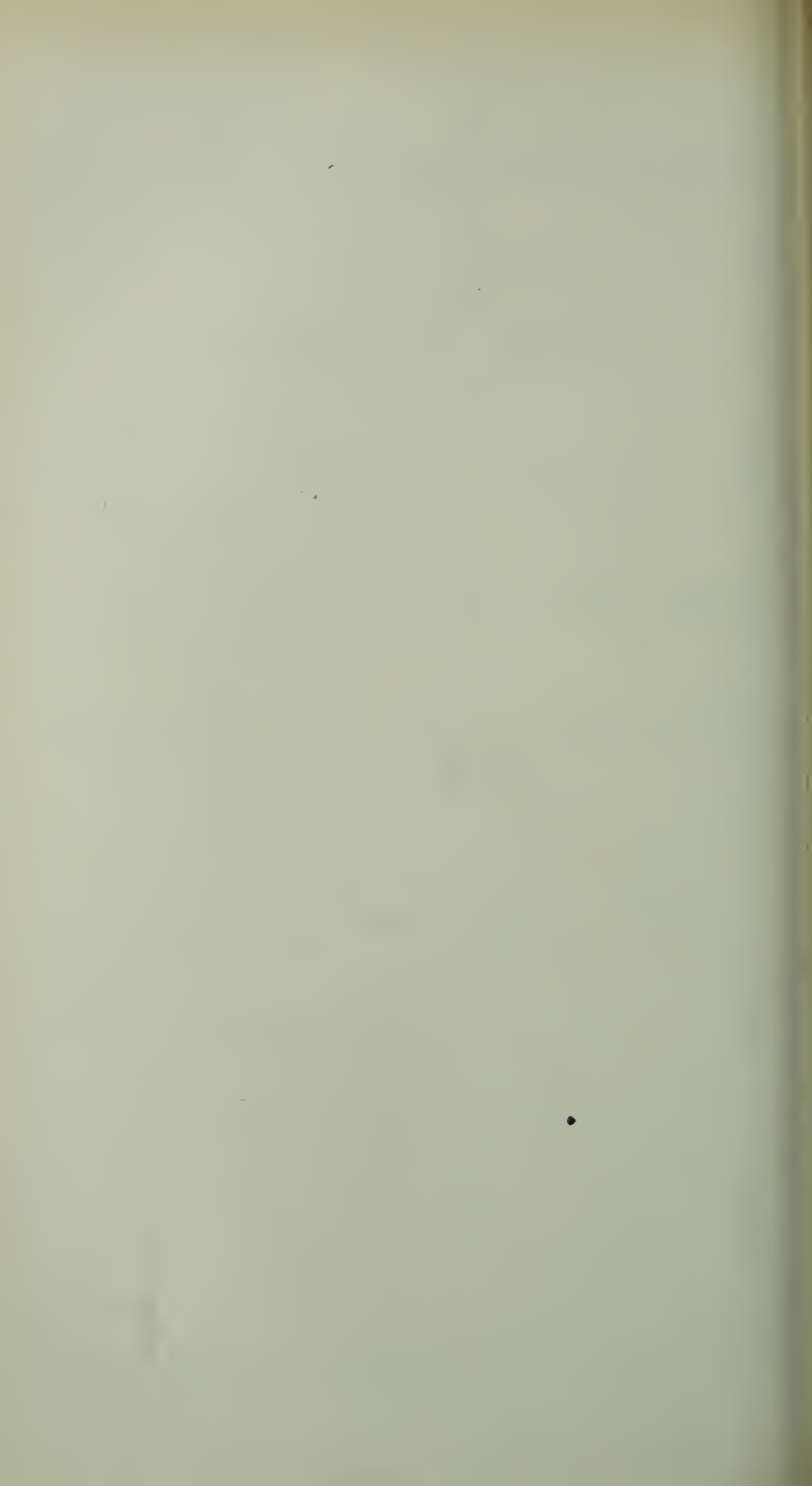
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INDEX

	Page
OPINION BELOW	1
JURISDICTION	1
QUESTION PRESENTED	3
STATUTE INVOLVED	5
STATEMENT	5
SUMMARY OF ARGUMENT.....	12
ARGUMENT:	
The District Court correctly fixed the statutory cost bases of the land and building in question for the proper determination of the taxpayer's loss sustained on the sale of the property in 1945, and its invested capital credits for ex- cess profits tax purposes for all taxable years.	14
CONCLUSION	41
APPENDIX	42

CITATIONS

Cases:

<i>American Liberty Oil Co. v. Commissioner</i> , 43 B.T.A. 76, affirmed, 127 F. (2d) 262, certio- rari denied, 317 U.S. 648.....	39
<i>Anderson v. Abbott</i> , 321 U.S. 349.....	19
<i>Bedell v. Commisisoner</i> , 30 F. (2d) 622.....	18
<i>Beretta v. Commissioner</i> , 1 T.C. 86, affirmed, 141 F. (2d) 452, certiorari denied, 323 U.S. 720	39
<i>Bourjois, Inc., v. McGowan</i> , 85 F. (2d) 510, cer- tiorari denied, 300 U.S. 682	28

<i>Chicago M. & St. P. Ry. v. Minn. Civic Assn.</i> , 247 U.S. 490	19
<i>Chisholm v. Commissioner</i> , 79 F. (2d) 14, cer- tiorari denied, 296 U.S. 641	28
<i>Clover v. Commissioner</i> , 143 F. (2d) 570.....	20
<i>Commissioner v. Court Holding Co.</i> , 324 U.S. 331	28
<i>Commissioner v. Laughton</i> , 113 F. (2d) 103....	33
<i>Commissioner v. Smith</i> , 136 F. (2d) 556.....	20
<i>Commissioner v. Sunnen</i> , 333 U.S. 591.....	35
<i>Commissioner v. Tower</i> , 327 U.S. 280.....	35
<i>Continental Oil Co. v. Jones</i> , 113 F. (2d) 557, certiorari denied, 311 U.S. 687.....	28
<i>Glenn v. Commissioner</i> , 3 T.C. 328.....	29
<i>Gray v. Powell</i> , 314 U.S. 402.....	19
<i>Gulf Oil Corp. v. Lewellyn</i> , 248 U.S. 71.....	19
<i>Halpin v. Commissioner</i> , 154 F. (2d) 112.....	20
<i>Haskell v. M'Clintic-Marshall Co.</i> , 289 Fed. 405	31
<i>Hay v. Commissioner</i> , 2 T.C. 460, affirmed, 145 F. (2d) 1001, certiorari denied, 324 U.S. 863.	29
<i>Helvering v. Clifford</i> , 309 U.S. 331.....	35
<i>Helvering v. Producers Corp.</i> , 303 U.S. 376....	35
<i>Helvering v. Stuart</i> , 317 U.S. 154.....	35
<i>Higgins v. Smith</i> , 308 U.S. 473.....	19, 20, 33
<i>Inland Development Co. v. Commissioner</i> , 120 F. (2d) 986	29
<i>Jones v. Dawson</i> , 148 F. (2d) 87.....	39
<i>Jones v. Dawson</i> , 148 F. (2d) 822.....	40
<i>Leicht v. Commissioner</i> , 137 F. (2d) 433.....	35

CITATIONS (*Continued*)iii
Page

<i>Linn Timber Co. v. United States</i> , 236 U.S. 574..	20
<i>Lucas v. Earl</i> , 281 U.S. 111.....	35
<i>Lyeth v. Hoey</i> , 305 U.S. 188.....	35
<i>McInerney v. Commissioner</i> , 82 F. (2d) 665....	28
<i>Meeker v. Durey</i> , 92 F. (2d) 607.....	28
<i>Meurer Steel Barrel Co. v. Commissioner</i> , 144 F. (2d) 282, certiorari denied, 324 U.S. 860..	28
<i>Moline Properties v. Commissioner</i> , 319 U.S. 436	19, 26, 31, 32
<i>Morgan v. Commissioner</i> , 309 U.S. 78.....	35
<i>Munson S.S. Line v. Commissioner</i> , 77 F. (2d) 849	28
<i>National Carbide Corp. v. Commissioner</i> , 336 U.S. 422	19, 21, 32
<i>National Investors Corp. v. Hoey</i> , 144 F. (2d) 466	25
<i>New Colonial Co. v. Helvering</i> , 292 U.S. 435..	34
<i>North Jersey Title Ins. Co. v. Commissioner</i> , 84 F. (2d) 898	29
<i>Old Mission P. Cement Co. v. Commissioner</i> , 69 F. (2d) 676, affirmed, 293 U.S. 289.....	18
<i>112 West 59th Street Corp. v. Helvering</i> , 68 F. (2d) 397	29
<i>O'Neill v. Commissioner</i> , 170 F. (2d) 596, cer- tiorari denied, 336 U.S. 937.....	20
<i>Paymer v. Commissioner</i> , 150 F. (2d) 334..	20, 28
<i>Roche v. Commissioner</i> , 63 F. (2d) 623.....	19
<i>Rockefeller v. United States</i> , 257 U.S. 176....	19
<i>Rogan v. Starr Piano Co., Pacific Division</i> , 139 F. (2d) 671	33

<i>iv</i>	CITATIONS (<i>Continued</i>)	Page
	<i>Southern Pacific Co. v. Lowe</i> , 247 U.S. 330	19
	<i>Taylor v. Standard Gas Co.</i> , 306 U.S. 307	28
	<i>Titus v. United States</i> , 150 F. (2d) 508, certiorari denied, 326 U.S. 773	20
	<i>United States v. Brager Building & Land Corp.</i> , 124 F. (2d) 349	28, 29
	<i>United States v. Del. Lack. & West. R. R.</i> 238 U.S. 516	20
	<i>United States v. Jelenko</i> , 23 F. (2d) 511	29, 31
	<i>United States v. Lehigh Valley R. R. Co.</i> , 220 U.S. 257	20
	<i>United States v. Pelzer</i> , 312 U.S. 399	35
	<i>United States v. Reading Co.</i> , 253 U.S. 26 . .	19, 20
	<i>Wier Long Leaf Lumber Co. v. Commissioner</i> , 173 F. (2d) 549	20

STATUTE

Internal Revenue Code:

Sec. 23 (26 U.S.C. 1946 ed., Sec. 23)	14, 42
Sec. 111 (26 U.S.C. 1946 ed., Sec. 111)	42
Sec. 112 (26 U.S.C. 1946 ed., Sec. 112)	36, 42
Sec. 113 (26 U.S.C. 1946 ed., Sec. 113) . .	36, 43, 45
Sec. 115 (26 U.S.C. 1946 ed., Sec. 115)	36, 44
Sec. 714 (26 U.S.C. 1946 ed., Sec. 714)	36, 37
Sec. 716 (26 U.S.C. 1946 ed., Sec. 716)	37
Sec. 717 (26 U.S.C. 1946 ed., Sec. 717)	37
Sec. 718 (26 U.S.C. 1946 ed., Sec. 718), 14, 37, 44, 45	
Sec. 719 (26 U.S.C. 1946 ed., Sec. 719)	37

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BRIEF FOR THE APPELLEE

OPINION BELOW

The opinion of the District Court (R. 185-194)
is reported in 83 F. Supp. 106.

JURISDICTION

This appeal involves corporate income and excess profits taxes of the appellant (hereinafter called the taxpayer) for the fiscal years ended November

30, 1941, to November 30, 1945, inclusive, ¹ in the aggregate sum of \$202,681.10, together with interest thereon according to law. (R. 3-5, 36-41, 207, par 5.)

The total amount of taxes in dispute for the four taxable years involved was assessed pursuant to the taxpayer's corporate income, declared value excess profits, excess profits and defense tax returns timely filed for such taxable years, and timely paid to and collected by the Collector during the years 1942 to 1946, respectively. (R. 3-5, 36-41.) Claims for the refund thereof — except for the year ended November 30, 1942 — were timely filed by the taxpayer on or about August 15, 1946, and more than six months had elapsed after the dates of the filing of such claims and the filing of this action without any notice of allowance or rejection thereof having been sent to the taxpayer by the Commissioner of Internal Revenue. (R. 6-7, 44, 214.) The taxpayer on August 29, 1947, and within the time provided by Section 3772 of the Internal Revenue Code, filed a protective suit to recover the taxes in dispute and interest thereon according to law. (R. 2-26.) Jurisdiction was con-

¹ The taxes sought to be recovered herein for the taxable year ended November 30, 1942, are not involved because the taxpayer's claim for the refund thereof was filed after the statute of limitations had run. (R. 33, par. 4, R. 44, par. 20, R. 185, 213-214, par. 22.)

ferred upon the District Court by Section 24, Fifth, of the Judicial Code, as amended and qualified by Section 3772 of the Internal Revenue Code, as amended (now 28 U.S.C., Section 1340). (R. 185.) Judgment was entered by the District Court on April 11, 1949, in favor of the Collector, with costs. (R. 223-224.) Thereafter, within sixty days, notice of appeal was filed by the taxpayer on May 9, 1949. (R. 224-225.) The jurisdiction of this Court is invoked by the provisions of 28 U.S.C. Section 1291.

QUESTION PRESENTED

The taxpayer purchased two lots for \$60,000 in April, 1901, legal title to which was held by its attorney, as agent, until October, 1903, when he transferred it to the Occident Trust Company (hereinafter called Occident), allegedly the taxpayer's wholly-owned subsidiary which had never been completely organized or issued any of its certificates of capital stock to anyone. In February, 1906, a few months after the taxpayer's completion of the construction of a building on the property at a cost of \$244,000 out of its own funds, Occident, the nominal holder of the property, transferred title thereto to the taxpayer, subject to an existing mortgage of \$150,000, at the appreciated book value of \$225,000 allegedly in exchange for Occident's unissued stock, purportedly in

liquidation. The conveyance was held by the taxpayer until January, 1908, when it was first filed for record, and thereafter, on August 23, 1909, Occident, without liquidation or dissolution had, was stricken from the State rolls as a corporation for failure to have paid its annual license fee.

The question presented is whether the cost of the property should be measured by the amount of money actually expended by the taxpayer in connection therewith, or the fair market value thereof on the date title thereto was transferred to the taxpayer in 1906 in ostensible liquidation of Occident, in order to ascertain the statutory basis for determining the amount of loss sustained by the taxpayer on the sale of the property in the taxable year ended November 30, 1945, under the provisions of Section 23 (f) of the Internal Revenue Code, and also the bases for invested capital credits for excess profits tax purposes for all taxable years involved, under Section 718 (a) (2) of the Internal Revenue Code, as amended.

The answer to the question depends on a decision as to whether the corporate entity of Occident should be recognized for tax purposes in connection with the record ownership of the property from 1903 up to the time it was formally transferred by Occident to the taxpayer in 1906, that is, whether the property

was owned by Occident or by the taxpayer during that period.

STATUTE INVOLVED

The provisions of the statute involved are set forth in the Appendix, *infra*.

STATEMENT

The facts (including exhibits) were stipulated in part by the parties (R. 36-46), and were found by the District Court therefrom and from the testimony and documentary evidence accordingly (R. 206-220). The pertinent facts were summarized by the District Court, sufficiently for present purposes, as follows (R. 186-190):

The taxpayer was organized as a corporation and began doing business, engaged in the wholesale hardware business in Seattle, in March, 1885. It prospered and expanded with the rapid growth of the city during the years following its establishment. In 1901, long before the days of federal income taxes, as well as before the days when workmen's compensation laws were in existence in the State of Washington, the taxpayer desired to acquire two lots adjoining the one it then owned, upon which it intended

to erect a building sufficiently large to meet its then needs and its needs through the future years. (R. 186.)

A deed of conveyance, dated April 19, 1901, from Stetson & Post Mill Company to Ira Bronson evidenced the purchase of the property desired by the taxpayer, the consideration therefor being \$60,000, which was paid by the taxpayer. The purchase was made by Bronson as the taxpayer's agent, and for the reason the taxpayer believed a better bargain could be obtained by dealing in this manner. Ira Bronson at all times held title to this property in trust for the true owner, the taxpayer. (R. 186.)

On April 15, 1901, at the direction of the taxpayer, Mr. Bronson, together with two other persons not identified with the taxpayer in any manner, organized the Occident Trust Company as a corporation, and Bronson subscribed for the entire capital stock of this corporation, as is evidenced by its articles of incorporation. These articles of incorporation were filed with the secretary of state two days later, April 17, 1901. On the same day that the articles of incorporation were executed by Mr. Bronson and his co-incorporators, they all resigned. There was no stock certificate ever issued to Bronson by the corporation

for all or any part of its capital stock, and neither money nor property passed from Mr. Bronson, nor any other person or corporation, to Occident for any of its capital stock. Occident never issued stock to anyone, as it kept no stock book. However, on the day of the execution of its articles of incorporation, following the resignation of its incorporators, M. D. Ballard, F. W. Baker, and C. H. Black, trustees and stockholders of the taxpayer, were elected to fill the vacancies of those resigned; and on April 18th, at a meeting of the stockholders of Occident, M. D. Ballard was elected president; F. W. Baker, treasurer; and C. H. Black, secretary, though they were not legally chosen for these positions since there was no one representing Occident either as incorporator or as stockholder to choose them. (R. 186-187.)

On September 1, 1903, the taxpayer set up a building committee to perfect plans for the erection of a building on the lots in question, legal title to which was then in the name of Bronson, its attorney. It employed architects and took all the essential steps for the construction of the building desired by it. It carried through all negotiations in the way of financial obligations for the construction of such building. It paid all the costs for the construction of the build-

ing in the total sum of \$244,000,² though it had them charged on its accounts to Occident. It also, during this period of time, and in the whole period of time from the original acquisition of this property until the completion and acceptance of the building, paid all the taxes and assessments against the property; and it collected the receipts produced from certain minor rentals before the old buildings that stood upon the property were removed to make way for the new corporation. (R. 187-188.)

On October 1, 1903, a warranty deed, executed by Bronson and wife to Occident, for a recited consideration of \$100,000, was placed of record. There was no actual consideration whatever passing from Occident to Bronson either in money or in stock. Construction of the taxpayer's building, in accordance with its plans and specifications, under orders and directions of its building committee, was undertaken by taxpayer. (R. 188.)

On September 21, 1905, it having been found that additional funds would be required to complete the construction of the building, the taxpayer negotiated for a loan of \$150,000 for the purpose of

²It is stipulated that the building on the two lots in question was completed in 1905 at a total cost of \$244,000 (R. 43,188), as the taxpayer states (Br. 5).

securing such funds. A note and mortgage were given, the mortgage being signed by Occident and the note by Occident and the taxpayer, as well as by certain members of the taxpayer's board of directors as individuals. The money produced by this mortgage went into the treasury of the taxpayer, and all principal and interest on account thereof was paid by the taxpayer. (R. 188.)

On February 21, 1906, which was a few months after the completion of the building, a deed was executed by Occident through its officers, who purported to act as such, conveying the property from Occident to the taxpayer, subject to the existing mortgage of \$150,000. This conveyance was held by the taxpayer until January 20, 1908, when it was filed for record. Thereafter, Occident entirely passed out of the picture, and the taxpayer, which had previously paid the annual license fee of Occident, no longer made such payments, so that, in due time thereafter, under the laws of the State of Washington, Occident as a corporation was stricken from the rolls. There never was a liquidation of Occident, since it had no assets from the time it was incorporated until it was stricken by the secretary of state for failure to pay its annual license fee. (R. 188-189.)

The purchase price of the lots in question in this

last transaction, the conveyance from Occident to the taxpayer, was set up in the books of the taxpayer as being \$225,000. This was the appreciated value of the property from the time it was first acquired by the taxpayer in 1901 to the time of the formal conveyance by Occident to it. (R. 189.)

In 1945 the taxpayer sold the property here in question at a figure that would result in a substantial loss if its initial cost be considered as \$225,000, the sum of money represented to have been paid to Occident upon conveyance of this property to it. If the base figure for cost be taken as the amount of money the taxpayer paid through its attorney, Bronson, in 1901, for the acquisition of the property, \$60,000, then the sale of the property in 1945 would show a profit and support the taxes assessed and collected herein. (R. 189-190.)

It is clearly established in this case that the taxpayer paid in actual money no more than the original \$60,000 which was furnished to Bronson, its attorney, when the property was purchased on its behalf. The property while in Bronson's name was held by him as the agent and representative of the taxpayer and for the taxpayer's use and benefit, subject to its orders and directions, and the same condition prevailed during all the time title stood in the name of Occident.

The sole purpose and object of acquiring the property in question by the taxpayer was to construct a building suitable for the business being carried on by it to meet its immediate and prospective needs. The passing of title from Bronson to Occident, and the holding of such title by Occident, were to relieve the taxpayer from any liability that might arise during the course of construction of the building. The paper transactions relating to the ownership of this property did not remove it from the assets of the taxpayer from the date of its acquisition in 1901. (R. 190.)

Upon the basis of the foregoing facts, the District Court denied any recovery to the taxpayer on the grounds that Occident was not recognizable for tax purposes as an independent corporate entity because it was a fully controlled instrumentality created by the taxpayer merely to hold title to its property temporarily; that therefore the real cost of the property in question was the aggregate of the amounts of \$60,000 for the two lots and \$244,000 for the building thereon as originally paid therefor by the taxpayer out of its own funds; and that, consequently, these amounts constituted the proper cost bases for calculating the taxpayer's liability for its income and excess profits taxes for the several taxable years involved here. (R. 185-194, 220-222.) The court below thereupon entered judgment in favor of the Collector,

with costs, accordingly (R. 223-224), from which the taxpayer appealed to this Court for review (R. 224-225).

SUMMARY OF ARGUMENT

The District Court properly held that the separate entity of Occident, the taxpayer's alleged subsidiary, may not, under the facts and authorities, properly be recognized for tax purposes, and thereupon found, upon the evidence, the correct statutory bases for computing the taxpayer's loss sustained on the sale of the property in question in 1945, and its invested capital credits for excess profits tax purposes, to be the amounts actually paid by the taxpayer for the two lots and the building thereon out of its own funds. Consequently, the larger cost bases contended for by the taxpayer are wrong and should not be allowed.

The separate identity of Occident should be ignored because it was merely an instrumentality of the taxpayer's business under the complete domination and control of the taxpayer without any real business purpose or activity other than to hold record title to the property for the taxpayer's use and benefit. It was never completely organized, had no legally chosen officers, kept no stock book or other books or records of its own, and never issued any of its

authorized capital stock to the taxpayer or anyone else for the property it was supposed to have owned. It served merely as a conduit for the passage of title to the property from its predecessor, the taxpayer's agent, on to the taxpayer after completion of construction of the building on the two lots, and it later passed out of existence by default as a corporate structure after the taxpayer's purposes in forming it had been accomplished. It was merely the nominal holder without any management or control over the property, whereas the taxpayer was the beneficial and true owner from the date of the original acquisition until the sale thereof. Even though Occident might have been a complete corporate organization under local law, nevertheless state laws covering transactions valid thereunder are not controlling under the federal laws for federal tax purposes, as here. Moreover, since there was never any liquidation or dissolution of Occident, the taxpayer's claim that it is entitled to cost bases equal to the value of Occident's stock purportedly exchanged for the property in question upon liquidation of the subsidiary in 1906, is without support in the record.

ARGUMENT

THE DISTRICT COURT CORRECTLY FIXED THE STATUTORY COST BASES OF THE LAND AND BUILDING IN QUESTION FOR THE PROPER DETERMINATION OF THE TAXPAYER'S LOSS SUSTAINED ON THE SALE OF THE PROPERTY IN 1945, AND ITS INVESTED CAPITAL CREDITS FOR EXCESS PROFITS TAX PURPOSES FOR ALL TAXABLE YEARS

The question for decision is the ascertainment of the proper statutory bases of the two lots and building in question ³ (hereinafter referred to as the property) for determining the correct amount of the taxpayer's loss sustained on the sale of the property in the taxable year 1945,⁴ under the provisions of Section 23 (f) of the Internal Revenue Code (Appendix, *infra*), and also the correct amounts of invested capital credits allowable in computing the taxpayer's excess profits taxes for the taxable years 1941 to

³ The controversy here relates only to Lots Nos. 1 and 2 and the building constructed thereon, there being no dispute over the basis of Lot No. 3, acquired by the taxpayer in 1919, and the furniture and other personal property involved in the sale of the property in 1945. (R. 211, 215.)

⁴ For convenience, references herein to the taxable years 1941 to 1945, inclusive, should be understood to mean the taxable years ended on November 30th of each of those years.

1945,⁵ inclusive, under the provisions of Section 718 (a) (2) of the Internal Revenue Code, as amended (Appendix *infra*). Determinative of this is the question whether Occident or the taxpayer owned the property in question in 1906 when the taxpayer ostensibly received it from Occident, its alleged subsidiary, upon the purported liquidation of the latter in that year.

The District Court found upon the evidence and held that Occident was at all times herein the fully controlled instrumentality of the taxpayer and therefore its separate corporate identity may not be recognized for tax purposes (R. 186-194, 207-220); and that, accordingly, the correct cost bases for the two lots and the building were the respective sums of \$60,000 and \$244,000, paid by the taxpayer out of its own funds, to be used for determining the gain or loss on the sale of the property in 1945, and also for computing the invested capital credits for excess profits tax purposes for all the taxable years involved (R. 212-217, 220-221). These were the amounts used by the taxpayer in making its tax returns for the several taxable years involved as adjusted by the Commissioner and accepted by the taxpayer up until the time when it filed the claims for refund herein in

⁵ As shown, the taxable year 1942 is not involved herein. (App. Br. 2; see fn. 1, *supra*.)

August, 1946 (R. 43, 213-214). We submit that the District Court was correct in so holding.

The taxpayer contends that the District Court erred in holding that Occident had an incomplete existence, and that therefore its corporate entity should be disregarded for tax purposes. (Br. 10-34.)

It is our position that the District Court properly held that the separate entity of Occident may not, under the facts and authorities, properly be recognized for tax purposes; and that the statutory bases it determined and found upon the evidence are the correct ones to be used for both determinations — loss and credits — for the record shows that the taxpayer actually paid those amounts out of its own funds for the purchase of the two lots and the construction of the building thereon. Consequently, the cost bases for determining the loss and the credits in question as contended for by the taxpayer (\$224,322 and \$270,751.38 for the two lots and the building, respectively (Br. 7, 34, 44-45, 50)) are wrong and should not be allowed.

It may be assumed for the sake of argument that in determining the correct invested capital credits for the several taxable years involved, the taxpayer is entitled to include the property in question as “property * * * previously paid in”, under the provisions

of Section 718 (a) (2); and, further, that in ascertaining the correct amount of the loss on the sale of the property in 1945, the cost basis thereof must be the aggregate of the amounts actually paid by the taxpayer for the two lots in 1901 and for the construction of the building thereon in 1904-1905, as the District Court found, or the fair market value of the property on February 21, 1906, when the subsidiary's assets were allegedly, upon its liquidation, distributed to the taxpayer, as the taxpayer contends.

In the first place, we think it is significant that the taxpayer itself, in filing its tax returns for the several years involved, used the cost bases of \$60,000 and \$244,000 for the two lots and the building, respectively. (R. 43, pars. 14 and 17, R. 213-214.) While it originally used the cost basis in the sum of \$220,000 for the two lots in computing invested capital in its 1941 tax return, the Commissioner thereafter reduced the basis to \$60,000 as representing the actual cost to the taxpayer. The taxpayer, moreover, made no objection to his action for several years thereafter in that it used the \$60,000 basis for computing its invested capital credits for the four subsequent taxable years (1942-1945), as indicated by its later using that amount, as finally determined by the Commissioner, as the proper basis in reporting

the loss on the sale of the property in 1945. (R. 213-214.) In this connection, the taxpayer's accountant, Meals, testified that the reason that it had acquiesced in the Commissioner's adjustments of the basis and determination to such effect up until the 1945 return, inclusive, was that it did not wish to engage in a controversy over the matter with the Government during the war and thereby keep all its tax years open for those years. He also testified, however, that the taxpayer was satisfied to continue to report its invested capital on that basis, as adjusted by the Commissioner, for all taxable years because it contemplated recovering by way of refund anyway. (R. 177-178). Moreover, the record shows that the taxpayer used the same basis, as adjusted by the Commissioner, in determining and reporting the loss on the sale of the property in 1945. (R. 43, 178-179, 213-214.) While the taxpayer's sworn returns showing its statements as to such cost bases are not necessarily conclusive, they were nevertheless received in evidence and might well be considered by this Court, along with the other evidence (R. 43, 177-179, 213-214), as the taxpayer's own declarations and admissions which were contrary to its position now being asserted here. *Old Mission P. Cement Co. v. Commissioner*, 69 F. (2d) 676 (C.A. 9th), affirmed, 293 U.S. 289; *Bedell v. Commissioner*, 30 F. (2d) 622 (C.A. 2d); *Roche v.*

Commissioner, 63 F. (2d) 623 (C.A. 5th).

Next, the record shows quite plainly that the separate corporate identity of Occident should be disregarded for tax purposes, and therefore the bases for both loss and credits should be actual cost to the taxpayer. While the general rule is that the corporate identity will not be ignored (*Moline Properties v. Commissioner*, 319 U.S. 436, 438-439), there are nevertheless compelling exceptions thereto where, as here, the facts and circumstances warrant ignoring the corporate entity for tax purposes lest adherence to the general rule result in disregarding substance for form to the detriment of the fisc, or recognizing the subsidiary which was merely an instrumentality, adjunct, agent or nominee of the parent corporation without any real business purpose or activity shown, or in substance merely a branch of the business subject to the parent's complete domination and control (*National Carbide Corp v. Commissioner*, 336 U.S. 422; *Anderson v. Abbott*, 321 U.S. 349; *Gray v. Powell*, 314 U.S. 402, 414; *Higgins v. Smith*, 308 U.S. 473, 477; *Rockefeller v. United States*, 257 U.S. 176; *United States v. Reading Co.*, 253 U.S. 26, 62-63; *Gulf Oil Corp. v. Lewellyn*, 248 U.S. 71; *Southern Pacific Co. v. Lowe*, 247 U.S. 330; *Chicago M. & St. P. Ry. v.*

Minn. Civic Assn., 247 U.S. 490, 501; *United States v. Del., Lack. & West. R. R.*, 238 U.S. 516, 529; *Linn Timber Co. v. United States*, 236 U.S. 574; *United States v. Lehigh Valley R. R. Co.*, 220 U.S. 257, 273; *Titus v. United States*, 150 F. (2d) 508, 511 (C.A. 10th), certiorari denied, 326 U. S. 773; *Clover v. Commissioner*, 143 F. (2d) 570, 571-572 (C.A. 9th); *O'Neill v. Commissioner*, 170 F. (2d) 596, 598 (C.A. 2d), certiorari denied, 336 U.S. 937; *Wier Long Leaf Lumber Co. v. Commissioner*, 173 F. (2d) 549 (C.A. 5th); *Paymer v. Commissioner*, 150 F. (2d) 334 (C. A. 2d); *Halpin v. Commissioner*, 154, F. (2d) 112 (C.A. 2d); *Commissioner v. Smith*, 136 F. (2d) 556 (C.A. 2d)).

In this connection, the Supreme Court, citing several of the above cases, stated in *United States v. Reading Co.*, 253 U.S. 26, as follows (pp. 62-63):

It results that it may confidently be stated that the law upon this subject now is, that while the ownership by a railroad company of shares of the capital stock of a mining company does not necessarily create an identity of corporate interest between the two such as to render it unlawful under the commodities clause for the railroad company to transport in interstate commerce the products of such mining company, yet where such ownership of stock is resorted to, not for the purpose of participating in the affairs of the corporation in which it is held in a manner normal and usual with stockholders, but for the

purpose of making it a mere agent, or instrumentality or department of another company, the courts will look through the forms to the realities of the relation between the companies as if the corporate agency did not exist and will deal with them as the justice of the case may require. * * *

National Carbide Corp. v. Commissioner, 336 U.S. 422, cited by the taxpayer (Br. 33) and distinguished hereinafter, is not at variance with the foregoing decisions, and quite apart from the factual differences between the cases, the Supreme Court's decision in *Higgins v. Smith*, 308 U.S. 473, points clearly to the difference in the questions of law involved, as follows (p. 477):

A taxpayer is free to adopt such organization for his affairs as he may choose and having elected to do some business as a corporation, he must accept the tax disadvantages.

On the other hand, the Government may not be required to acquiesce in the taxpayer's election of that form for doing business which is most advantageous to him. The Government may look at actualities and upon determination that the form employed for doing business or carrying out the challenged tax event is unreal or a sham may sustain or disregard the effect of the fiction as best serves the purposes of the tax statute. * * * It is command of income and its benefits which marks the real owner of property.

Thus, applying the rules laid down in the above-cited cases to the facts here, and looking through form to the realities of the relationship between the

taxpayer and the subsidiary, it is readily apparent that Occident had no existence at all as a complete corporate entity. It was never completely organized, had no stock book or other books and records of its own,⁶ and never issued or sold any of its authorized shares of capital stock to anyone. (R. 60.) Neither money nor property ever passed from the taxpayer or any other corporation or person to Occident for any of its shares of stock, and it had no *legally chosen* officers or directors.⁷ It is not shown to have conducted any business activity of any kind, having

⁶ The District Court found that the taxpayer's Exhibit 5 (Articles of Incorporation of Occident Trust Company and Minutes of its Board of Trustees and Stockholders from April 15, 1901, to September 20, 1905) was the only record Occident ever had. (R. 191.) The only records in respect of Occident were kept by the taxpayer on its own books. (R. 130-131, 209; Ex. 2 (taxpayer's Minute Book), and Ex. 8 (taxpayer's Private Ledger and Monthly Statement).)

⁷ The District Court found that upon the resignation of its incorporators on the date of the execution of Occident's articles of incorporation on April 17, 1901, certain trustees and stockholders of the taxpayer were elected to fill the vacancies of the incorporators then just resigned, and on the next day the same stockholders of the taxpayer were elected as officers of Occident, although they were not legally chosen for such positions because there was no one representing Occident either as incorporator or as stockholder to choose them. (R. 208.)

merely received title to the property in question from the taxpayer's attorney and agent, Bronson, who had no beneficial interest therein (R. 58), for the *recited* consideration of \$100,000, although no actual consideration whatever in money or stock ever passed between them. Occident, without any credit standing shown, had to rely on the taxpayer and certain members of its board of directors as individuals as guarantors, to join in signing the mortgage and note in order to secure the loan of \$150,000, *negotiated by the taxpayer*, for the additional funds necessary for *the taxpayer's* constructing the building on the lots in question. (R. 52-53, 130). Just as the taxpayer's agent, Bronson, transferred title to the property to Occident in October, 1903, without any consideration whatever — stock, money or property — therefor, so Occident ostensibly passed the title, subject to the \$150,000 mortgage, on to the taxpayer in February, 1906, without consideration shown in exchange therefor — money, shares of its own stock, or other property. The taxpayer received the deed therefor from Occident but did not file it for record until January, 1908, after which Occident, without liquidation or dissolution, was stricken from the state corporate records in 1909 for failure to have paid its annual li-

cense fees.⁸ (R. 56, 186-192, 208-210, 214-217.)

Under these facts, it is clear that the alleged subsidiary, instead of having conducted business in the ordinary meaning or having any real commercial reason for its organization, had no genuine business purpose or activity, and, indeed, was never completely organized as a corporate structure acting in any sense, directly or indirectly, as an independent entity. Rather, as shown, it was only a partially formed organization serving in the capacity of a department, adjunct, instrumentality, agent or nominee of the taxpayer as the nominal holder of title to the property in question during its short but incomplete existence (R. 64-65), and merely "considered * * * a holding company" by the taxpayer's own officers (R. 68). Thus, in effect it was merely a branch of the taxpayer, subject to its complete domination and control, as the District Court found and held. (R.

⁸ The taxpayer's Exhibit 7 (not printed in the record) contains the following statement by the Secretary of the State of Washington, dated February 21, 1948:

* * * the records of this office show that OCCIDENT TRUST COMPANY of Seattle, Washington, was stricken from our records on August 23, 1909 for non-payment of its annual license fees and has had no legal corporate existence in this state since that time. No formal dissolution papers were ever filed for this corporation.

191, 208-210, 214-216, 220.) Apropos of this situation, the court stated in *National Investors Corp. v. Hoey*, 144 F. (2d) 466 (C.A. 2d), as follows (pp. 467-468):

In that case (*Moline Properties v. Commissioner*, 319 U.S. 436) the question was whether the corporation might insist upon the Treasury's including capital gains within the gross income of its sole shareholder, and the court decided that it might not. That was the same situation as existed in *Burnet v. Commonwealth Improvement Co.*, *supra*, 287 U.S. 415, 53, S.Ct. 198, 77 L.Ed. 399. The gloss then put upon *Higgins v. Smith*, *supra*, was deliberate and is authoritative: it was that, whatever the purpose of organizing the corporation, "so long as that purpose is the equivalent of business activity or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity." 319 U.S. 439, 63 S.Ct. 1134, 87 L.Ed. 1499. That, as we understand it, is the same interpretation which was placed upon corporate reorganizations in *Gregory v. Helvering*, 293 U.S. 465, 55 S.Ct. 266, 79 L.Ed. 596, 97 A.L.R. 1355, and which has sometimes been understood to contradict the doctrine that the motive to avoid taxation is never, as such, relevant. In fact it does not trench upon that doctrine; it merely declares that to be a separate jural person for purposes of taxation, a corporation must engage in some industrial, commercial or other activity besides avoiding taxation; in other words, that the term "corporation" will be interpreted to mean a corporation which does some "business" in the ordinary meaning; and that escaping taxation is not "business" in the ordinary meaning.

Thus, the court there emphasized (p. 468) the rule to be that, regardless of motives of tax avoidance, transactions between a corporation and its subsidiary for tax purposes may be disregarded as lacking in substance where, as here, the subsidiary is not engaged in carrying on "some 'business' in the ordinary meaning" of the term. Hence, in such cases, the mere holding of title, as by Occident here, does not constitute a separate business activity warranting recognition of the subsidiary's corporate form for tax purposes. As stated in *Moline Properties v. Commissioner*, 319 U.S. 436, 438-439, "Whether the purpose be * * * to serve the creator's personal or undisclosed convenience," when we have "appraised the relation between a corporation and its sole stockholder * * * there are recognized exceptions" for tax purposes where "In general, in matters relating to the revenue, the corporate form may be disregarded where it is a sham or unreal. In such situations the form is a bald and mischievous fiction."

There are further reasons why the corporate entity of Occident should be disregarded here. As shown, Occident did not take title to the property in any permanent sense and in its own behalf but rather, as did its predecessor titleholder, Bronson, who was also merely the taxpayer's nominee retained for the same purpose, solely as the taxpayer's *alter ego* and

subject to its complete domination and control. The record shows that Occident had no possible corporate function or purpose other than, like Bronson, to hold title to the property temporarily for the taxpayer's use and benefit. (R. 64-65, 120, 208-210, 214-216.) This is made manifest by the fact that upon Occident's transferring title to the property to the taxpayer, the latter held the deed in a dormant state and unrecorded until Occident had served all its purposes — escape from the risk of liability — in forestalling possible suits against the taxpayer in connection with the construction of the building on the two lots (R. 50-51, 60-62, 67), after which, without, liquidation or dissolution, it was permitted to become obliterated by operation of state law for nonpayment of its corporate license fees (R. 210). Considering Occident in its true relationship to the taxpayer, therefore, and in the light of the rules laid down in *United States v. Reading Co.*, 253 U.S. 26, 62-63, and *Moline Properties v. Commissioner*, 319 U.S. 436, 438-439, it is clear that it served the taxpayer's convenience merely as a branch or department of its business in order to hold the record title temporarily to its property. The taxpayer, however, was the beneficial and true owner of the property from its acquisition in 1901 until its sale in 1945, as the facts show and the District Court found and held. (R. 186-190, 207-211, 214-217, 220.)

Occident is not shown to have participated in the active management or control of the property, realized any income or declared any dividends, had any salaried officers or employees, or to have done anything whatever in a business sense or otherwise except to hold the record title to the property for the taxpayer. (R. 64-66.)

In these circumstances, it is clear that the corporate entity of Occident should be disregarded, and the property in question treated as belonging to the taxpayer in which the beneficial use and interest lay at all times herein. *Commissioner v. Court Holding Co.*, 324 U.S. 331; *Taylor v. Standard Gas Co.*, 306 U.S. 307, 322; *Paymer v. Commissioner*, 150 F. (2d) 334, 337 (C.A. 2d); *Meurer Steel Barrel Co. v. Commissioner*, 144 F. (2d) 282 (C.A. 3d), certiorari denied, 324 U.S. 860; *Chisholm v. Commissioner*, 79 F. (2d) 14 (C.A. 2d), certiorari denied, 296 U.S. 641; *United States v. Brager Building & Land Corp.*, 124 F. (2d) 349 (C.A. 4th); *Continental Oil Co. v. Jones*, 113 F. (2d) 557 (C.A. 10th), certiorari denied, 311 U.S. 687; *Meeker v. Durey*, 92 F. (2d) 607 (C.A. 2d); *Bourjois Inc. v. McGowan*, 85 F. (2d) 510 (C.A. 2d); certiorari denied, 300 U.S. 682; *McInerney v. Commissioner*, 82 F. (2d) 665 (C.A. 6th) (involving a dummy corporation created to complete the sale and transfer of property); *Munson S. S. Line v. Commis-*

sioner, 77 F. (2d) 849 (C.A. 2d); *112 West 59th Street Corp. v. Helvering*, 68 F. (2d) 397, 398 (C.A. D.C.) (holding that the corporate entity should be disregarded because it furnished only the structure for its taking and holding title and the channel through which title should pass when the sale of the property was made while it held legal title thereto); *United States v. Jelenko*, 23 F. (2d) 511, 515 (Md.); cf. also *Inland Development Co. v. Commissioner*, 120 F. (2d) 986 (C.A. 10th); *North Jersey Title Ins. Co. v. Commissioner*, 84 F. (2d) 898 (C.A. 3d); *Hay v. Commissioner*, 2 T.C. 460, affirmed, 145 F. (2d) 1001 (C.A. 4th), certiorari denied, 324 U.S. 863; *Glenn v. Commissioner*, 3 T.C. 328.

In *United States v. Brager Building & Land Corp.*, 124 F. (2d) 349 (C.A. 4th), the court stated as follows (p. 352):

The purely nominal character of the Brager Building and Land Corporation is established beyond question by the undisputed facts set out above. It was a convenient agency chosen by the owners to hold the record title of their property, and nothing more. It performed no other function, it engaged in no other activity, and was at all times completely subject to the dominion and control of the Brager partnership. The income from the property was in our opinion income of the partnership.

In *Inland Development Co. v. Commissioner*, 120

F. (2d) 986 (C.A. 10th), wherein the corporate entities of the subsidiaries were disregarded and the property was treated as belonging to the parent corporation for tax purposes, the court stated as follows (pp. 989-990):

The fact that a parent corporation owns all of the stock of its subsidiary, of itself and alone, does not warrant the disregard of their separateness of corporate entity. That separateness is disregarded where the ownership of stock is used to dominate and control the subsidiary in such manner and to such extent that it becomes a mere agency or instrumentality of the parent.
* * *

* * *. They (the subsidiaries) did not buy, acquire, manage, control, sell, receive, or pay out anything. The taxpayer did all of that, without voice on the part of the subsidiaries. * * *. But whatever the underlying reason (for forming the subsidiaries) may have been, it is clear that the subsidiaries were nothing more than voiceless departments or instrumentalities of the taxpayer. Substance is paramount over form in the application of income tax laws. *United States v. Phellis*, 257 U.S. 156, 42 S.Ct. 63, 66 L.Ed. 180; *Tulsa Tribune Co. v. Commissioner of Internal Revenue*, 10 Cir., 58 F. (2d) 937; *Reynolds v. Cooper*, 10 Cir., 64 F. (2d) 644, affirmed, 291 U.S. 192, 54 S.Ct. 356, 78 L.Ed. 725; *North Jersey Title Insurance Co. v. Commissioner of Internal Revenue*, 3 Cir., 84 F. (2d) 898; *Commissioner of Internal Revenue v. Texas Pipe Line Co.*, 3 Cir., 87 F. (2d) 662. In harmony with that recognized rule, the separateness of corporate entity of the taxpayer and its subsidiaries should be disregarded in determining

whether the taxpayer was a holding company, coming within the ambit of the statute. * * *.

In *United States v. Jelenko*, 23 F. (2d) 511 (Md.), the court stated as follows (p. 515):

* * * the corporation was only a legal concept, a name to be used as a business convenience, with no means to conduct substantial transactions in real estate. But the facts in connection with the moneys on deposit and the books of account are not consistent with the theory of corporate ownership. It would be, in the opinion of the court, a forced construction to hold that the mere grant of a corporate charter, and the occasional use of the corporate name, so changed the legal situation that the business became corporate in law, although the activities of the defendants were continued as theretofore in the partnership relation.

Many of the cases cited by the taxpayer (Br. 20-34) were distinguished by the District Court (R. 192-193). Thus, *Haskell v. M'Clintic-Marshall Co.*, 289 Fed 405 (C.A. 9th), and *Moline Properties v. Commissioner*, 319 U.S. 436, relied on particularly by the taxpayer (Br. 20-26, 29, 33), were both distinguished below (R. 192-193) on the ground that the corporate structures of the subsidiaries there were in all respects completely organized corporations carrying on business activities within the limits of their articles of incorporation, issuing stock and keeping books and records, assuming business responsibilities entirely independent of their parent corporations, and

had real business purposes for their existence beyond being the mere *alter ego*, agent, instrumentality or conduit of their parent corporations. All these factors are absent in the present case. In the *Moline Properties* case, the Supreme Court stated (p. 440):

In 1934 petitioner engaged in an unambiguous business venture of its own — it leased a part of its property as a parking lot, receiving a substantial rental. The facts, it seems to us, compel the conclusion that the taxpayer had a tax identity distinct from its stockholder.

It is clear that, as shown, the facts here compel the opposite conclusion.

The recent decision in *National Carbide Corp. v. Commissioner*, 336 U.S. 422, also relied on by the taxpayer (Br. 25, 29, 33), was handed down after the present case was decided. The Supreme Court, although recognizing the corporate entity under the particular facts there, nevertheless made it clear that if one corporation acts merely in a nominal capacity as the fully controlled instrumentality or agent of another, as herein, the entity of the corporation so acting may be disregarded for tax purposes. The subsidiary corporations there, however, were formed, operated and utilized by the parent corporation for the express purpose of conducting certain real business activities as operating companies for the parent in the manufacture and sale of their products, and

they made profits which, in excess of 6% on their capitalization, they paid to the parent corporation. Thus they actively carried on business activities on their own account, a situation not present here. Consequently, aside from the clear factual differences between the two cases, there is nothing in that case repugnant to the District Court's holding here.

Finally, such cases as *Commissioner v. Laughton*, 113 F. (2d) 103 (C.A. 9th), and *Rogan v. Starr Piano Co., Pacific Division*, 139 F. (2d) 671 (C.A. 9th), for example, likewise relied on by the taxpayer (Br. 25-26, 30-31), are clearly distinguishable on their facts, as the District Court held (R. 193). In fact, this Court indicated that the question of respecting or ignoring the separate corporate entity in the *Laughton* case was to be determined in accordance with the rules enunciated in *Higgins v. Smith*, 308 U.S. 473, as we have already demonstrated in respect of the issue here. This Court found it necessary, however, to remand the *Laughton* case to the Board of Tax Appeals to make a finding as to whether the taxpayer's solely owned corporation was used for an independent business purpose or for a transfer of assets (his services), with control retained, solely to reduce tax liability.

In the *Starr Piano Co.* case, where this Court

held that there was no legal basis for ignoring the corporate entity of the taxpayer's subsidiary in determining whether there was a merger under California law, it was undisputed that the two corporations were and had been entirely separate organizations for many years, conducting wholly separate business activities over a long period of time and keeping separate corporate books and records. Thus, there were ample grounds for recognizing the corporate entity there. Here, however, as shown, the evidence clearly discloses an arrangement under which there was merely a temporary nominal holding of the record title to the property by the alleged subsidiary, and that it was used as a mere conduit for the taxpayer's purposes. Hence, the present case, unlike that case, was, as this Court quoting from *New Colonial Co. v. Helvering*, 292 U.S. 435, stated (p. 674), "subject to the qualification that the separate identity may be disregarded in exceptional situations".

Finally, the taxpayer makes the further argument that the organization of Occident was complete under local law. (Br. 10-13.) The facts and authorities do not support its contention in this respect. The issue here is determinable by federal rather than state law for federal law must be consulted and the federal statutes construed

in determining what particular rights should be taxed. *Morgan v. Commissioner*, 309 U.S. 78; *Helvering v. Producers Corp.*, 303 U.S. 376. The legal significance of a transaction under state law is not necessarily controlling in federal tax matters. *Helvering v. Stuart*, 317 U.S. 154, 161; *United States v. Pelzer*, 312 U.S. 399, 402-403; *Leicht v. Commissioner*, 137 F. (2d) 433, 435 (C.A. 8th). It is settled that state laws covering transactions valid thereunder are not controlling for federal tax purposes unless Congress has expressly or by implication indicated that local law was to be decisive, a situation not present here. *Commissioner v. Tower*, 327 U.S. 280, 287; *Helvering v. Clifford*, 309 U.S. 331; *Lyeth v. Hoey*, 305 U.S. 188; *Lucas v. Earl*, 281 U.S. 111; cf. *Commissioner v. Sunnen*, 333 U.S. 591, 605-606.

It is the taxpayer's position that, contrary to the District Court's decision, the separate identity of Occident should be respected to the end that the cost bases of the property in question for purposes of determining the loss and invested capital credits should be the fair market value of Occident's stock surrendered when the property was transferred to it in 1906. (Br. 34-50.) The argument is that since it acquired the property upon the liquidation of Occident on February 21, 1906, in exchange for the lat-

ter's stock which the taxpayer allegedly owned,⁹ the basis for determining the loss on the sale of the property in 1945 was the cost to the taxpayer, as provided in Sections 112 and 113 (a) of the Internal Revenue Code (Appendix, *infra*); and that such cost must be measured by the fair market value of the stock it owned in the subsidiary on the date of liquidation and dissolution thereof, which value in turn must be measured by the fair market value of the assets of the subsidiary which the taxpayer received in exchange for the latter's stock. (Br. 34-44.) It urges further that the correct amounts of invested capital credits allowable in computing its excess profits taxes for the several taxable years involved are determinable by including the property which it received from the subsidiary on the basis of cost which it claims should be measured by the fair market value of the property on February 21, 1906, the alleged date of its acquisition, the same as the alleged bases for determining the loss.¹⁰ (Br. 44-50.) In such event, the bases for

⁹ Section 115 (c) of the Internal Revenue Code (Appendix, *infra*) provides that amounts distributed in complete liquidation of a corporation "shall be treated as in part or full payment in exchange for the stock."

¹⁰ In computing federal excess profits taxes, corporations are permitted, at their option, to use an "invested capital" credit for each taxable year, as provided by Section 714 of the Internal Revenue Code

determining the loss and invested capital credits would be the respective sums of \$224,322 and \$270,751.38 for the two lots and the building at the time of the purported transfer by Occident to the taxpayer on February 21, 1906.¹¹ (Br. 34 - 49.)

We have already shown, however, that under the facts and decisions, the corporate entity of Occident

(26 U.S.C. 1946 ed., Sec. 714). Section 716 of the Code (26 U.S.C. 1946 ed., Sec. 716) provides that "The average invested capital" for any taxable year shall be the aggregate of the daily invested capital for each day of such year, divided by the number of days in such year. Section 717 of the Code (26 U.S.C. 1946 ed., Sec. 717) provides that the "daily invested capital" shall be the sum of the "equity invested capital" for such day plus the "borrowed invested capital" for the day, determinable under Section 719 of the Code. Section 719 of the Code (26 U.S.C. 1946 ed., Sec. 719) in turn defines the method of computing borrowed invested capital, which is not involved here. Section 718 (a) (2) of the Code (Appendix, *infra*) defines equity invested capital on any day in the taxable year to include the property paid in for stock, paid-in surplus, or as a contribution to capital, and provides that the property shall be included in an amount equal to its basis (unadjusted) for determining loss upon a sale or exchange.

¹¹ If the taxpayer's position is correct, there is no dispute over the fair market value of the property in question at the time of the alleged transfer of title thereto from Occident to the taxpayer on February 21, 1906, for it is stipulated that the two lots had a value of \$224,322 and the building a value of \$270,751.38 on that date. (R. 43-44; App. Br. 34.)

must be disregarded here for tax purposes; that no stock of Occident was ever issued or turned over for the property in question to the taxpayer or anyone else (R. 208); and that the actual cost of the property in question, as paid by the taxpayer out of its own funds, was \$60,000 for the two lots in 1901, and \$244,000 for the construction of the building in 1904-1905, as the District Court found and held (R. 214, 216-217).

The record shows that, contrary to the taxpayer's contentions (Br. 34-35, 38, 44, 50), there was no liquidation or dissolution of Occident or distribution of its assets in February, 1906, or at any other time. It remained in existence, incomplete as it was, until August 23, 1909, when it was stricken from the state records as legally non-existent for nonpayment of its annual corporate license fees. (R. 56, 189, 210; see fn. 8, *supra*.) Furthermore, although Occident, through its purported officers — who were also officers and stockholders of the taxpayer — executed a conveyance in 1906 ostensibly transferring title to the property to the taxpayer, the deed was never recorded until January 20, 1908, pursuant to the understanding of the parties that it was to be held in abeyance without being filed for record pending the settlement of potential claims for legal liability which

would, under such circumstances, arise against the subsidiary — instead of the taxpayer — during the course of the construction of the building. (R. 50-51, 67, 123, 190.)

In these circumstances, it is apparent that in view of the close relationship between Occident and the taxpayer, the deed during the two-year period before it was actually recorded in 1908 could readily have been invalidated through its return to the subsidiary or upon destruction by the taxpayer. Hence, there is shown no completed, effective legal transfer of the property by Occident to the taxpayer until the deed was recorded in 1908 at the earliest, and consequently no absolute and unconditional transfer to and receipt of the property by the taxpayer from Occident under the purported conveyance of February 21, 1906. This is true even assuming that, contrary to the facts and decisions, Occident was a real corporation recognizable for tax purposes instead of, as shown, merely an instrumentality of convenience completely controlled by the taxpayer at all times. *American Liberty Oil Co. v. Commissioner*, 43 B.T.A. 76, affirmed, 127 F. (2d) 262 (C.A. 5th), certiorari denied, 317 U.S. 648; *Beretta v. Commissioner*, 1 T.C. 86, affirmed, 141 F. (2d) 452 (C.A. 5th), certiorari denied, 323 U.S. 720; *Jones v. Dawson*, 148 F. (2d)

87 (C.A. 10th); *Jones v. Dawson*, 148 F. (2d) 822 (C.A. 10th). Accordingly, even under its own theory, the taxpayer must necessarily fail for lack of proof in attempting to establish the fair market value of the property on the critical date of the alleged transfer (February 21, 1906) for the only evidence in the record as to the real value of the property is the value as of that date, as stipulated (R. 43-44), and there is no proof as to the value of the property on any subsequent date. It follows, we submit, that the taxpayer has failed to establish any bases for the property in question for determining the claimed loss and invested capital credits for excess profits tax purposes, other than those correctly determined and found, upon the evidence, by the District Court.

CONCLUSION

The judgment of the District Court is correct and should therefore be affirmed upon review by this Court.

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APPENDIX

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * *

(f) *Losses by Corporations.*—In the case of a corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise.

* * * *

(26 U.S.C. 1946 ed., Sec. 23.)

SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.

(a) *Computation of Gain or Loss.* — The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113 (b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

* * * *

(26 U.S.C. 1946 ed., Sec. 111.)

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General Rule.*—Upon the sale or ex-

change of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) *Exchanges Solely in Kind.*—

* * * *

(6) *Property received by corporation on complete liquidation of another.*—No gain or loss shall be recognized upon the receipt by a corporation of property distributed in complete liquidation of another corporation. * * *

* * * *

(26 U.S.C. 1946 ed., Sec. 112.)

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that —

* * * *

(11) *Property acquired during affiliation.*—In the case of property acquired by a corporation, during a period of affiliation, from a corporation with which it was affiliated, the basis of such property, after such period of affiliation, shall be determined, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, without regard to inter-company transactions in respect of which gain or loss was not recognized. * * *

(15) *Property received by a corporation on complete liquidation of another.*—If the property was received by a corporation upon

a distribution in complete liquidation of another corporation within the meaning of Section 112 (b)(6), then the basis shall be the same as it would be in the hands of the transferor. The basis of property with respect to which election has been made in pursuance of the last sentence of Section 113 (a)(15) of the Revenue Act of 1936, as amended, shall, in the hands of the corporation making such election, be the basis prescribed in the Revenue Act of 1934, as amended.

(26 U.S.C. 1946 ed., Sec. 113.)

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

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(c) *Distributions in Liquidation.*—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. * * *

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(26 U.S.C. 1946 ed., Sec. 115.)

SEC. 718 [As added by Sec. 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974].

EQUITY INVESTED CAPITAL.

(a) *Definition.*—The equity invested capital for any day of any taxable year shall be determined as of the beginning of such day and shall be the sum of the following amounts, reduced as provided in subsection (b)—

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(2) [As amended by Sec. 218 of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Property paid in.* — Property (other than money) previously paid in (regardless of the time paid in) for stock, or as paid-in surplus, or as a contribution to capital. Such property shall be included in an amount equal to its basis (unadjusted) for determining loss upon sale or exchange. If the property was disposed of before such taxable year, such basis shall be determined¹² under the law applicable to the year of disposition, but without regard to the value of the property as of March 1, 1913. If the property was disposed of before March 1, 1913, its basis shall be considered to be its fair market value at the time paid in. * * *

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(4) *Earnings and profits at beginning of year.*—The accumulated earnings and profits as of the beginning of such taxable year.

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(26 U.S.C. 1946 ed., Sec. 718.)

¹² Prior to this amendment by Section 218 of the Revenue Act of 1942, the material in the third sentence following the phrase, "such basis shall be determined", read "in the same manner as if the property were still held at the beginning of such taxable year. If such unadjusted basis is a substituted basis it shall be adjusted, with respect to the period before the property was paid in, in the manner provided in Section 113 (b) (2);" which provisions are applicable to the taxpayer's fiscal year ended November 30, 1941.

